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Intermountain Health Car, Inc. v. Industrial Commission of Utah and Mary Jean Ortega : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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INTERMOUNTAIN HEALTH CARE, INC., a Utah corporation d/b/a LDS HOSPITAL, Appellant, -vs- INDUSTRIAL COMMISSION OF UTAH and MARY JEAN ORTEGA, Respondents.	Case No. 14090

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BRIEF OF RESPONDENT

ORIGINAL ACTION TO REVIEW THE PROCEEDINGS AND ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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INTERMOUNTAIN HEALTH CARE, INC., a Utah corporation d/b/a LDS HOSPITAL, Appellant, -vs- INDUSTRIAL COMMISSION OF UTAH and MARY JEAN ORTEGA, Respondents.	Case No. 14690

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BRIEF OF RESPONDENT

ORIGINAL ACTION TO REVIEW THE PROCEEDINGS AND ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a temporary order of the Industrial Commission of Utah awarding workmen's compensation benefits to claimant Mary Jean Ortega against petitioner Intermountain Health Care, Inc.

DISPOSITION OF THE CASE BEFORE THE INDUSTRIAL COMMISSION

The claim of defendant Ortega against plaintiff was heard by the defendant Commission, after which Mrs. Ortega appeared before a medical panel which subsequently issued a report. Based on the report, the Industrial Commission issued a temporary order, subsequently amended, which awarded temporary

total disability payments and medical payments to defendant Ortega pending a final determination on the issue of permanent partial disability.

RELIEF SOUGHT IN THIS COURT

Respondent seeks affirmance of the orders issued by respondent Industrial Commission of Utah appealed in this case.

STATEMENT OF THE FACTS

Claimant Mary Jean Ortega was employed by petitioner Intermountain Health Care (hereafter Intermountain) as a laborer in the laundry operation of the LDS Hospital when she strained her back lifting large laundry bags on the evening of November 11, 1970. She had been so employed for approximately two years prior to this injury. Following the accident, Mrs. Ortega undertook a full course of treatment at Intermountain's facilities for the physical aspects of the injury, and no claim relating to this therapy is presented herein. The source of the dispute underlying this appeal concerns a psychological complication that developed subsequent to the injury known as a "functional overlay". In Mrs. Ortega's case it involves a continuation and increase in the pain that originally attended the physical injury. Regarding this condition, the physician treating Mrs. Ortega's physical injury submitted the following comment to Intermountain's insurance adjuster:

> " ... a certainly large amount of her pain is psychological in origin. This does not mean that it does not seem to be real to her. She will not return to work. These are always difficult problems, espe-

cially since the patient probably will not get well with ordinary physical means and psychological evaluation and counseling is indicated." (emphasis added by Industrial Commission)

In regard to the functional overlay problem, the medical panel appointed by the Industrial Commission made a preliminary finding that Mrs. Ortega was thirty per cent permanently partially disabled; ten per cent of which was a pre-existing condition, with the remaining twenty per cent being attributable to the accident of November 11th while working for Intermountain. Considering the medical panel's report along with the other evidence relating to the claimant's condition, the Industrial Commission found that Mrs. Ortega was temporarily totally disabled and is now permanently partially disabled, although it expressly reserved a final determination of the degree of permanent impairment pending the course of psychiatric treatment which the medical panel indicated could lead to a significant improvement in Mrs. Ortega's condition. Accordingly, the Industrial Commission entered an order directing Intermountain to pay Mrs. Ortega a sum for temporary total disability until her psychiatrist releases her as fit for work, and a sum for treatment of the psychological disability excluding that relating to family or marital counseling.

ARGUMENT

POINT I

UTAH CODE ANNOTATED AS AMENDED 1953, 35-1-69 DOES NOT REQUIRE THAT THE INDUSTRIAL COMMISSION APPORTION THE COSTS OF TREATMENT IN THE MANNER REQUESTED BY INTERMOUNTAIN.

The case law interpreting U.C.A. 35-1-69 has not held that the Industrial Commission must apportion the costs of its award in cases such as presented here. As authority for its decision, the Industrial Commission cited the case of Powers v. Industrial Commission, 19 Utah 2d 140, 427 P.2d 740 (1967). The plaintiff there was a fireman who had a pre-existing heart ailment which developed into a severe anginal attack while on route to a fire. The Commission denied Powers claim for compensation on the grounds that no compensible industrial accident had occurred. In holding that the incident of claimant's anginal attack was an industrial accident, this court stated at page 743, of 427 P.2d:

> "The law is well settled that the aggravation or lighting up of a pre-existing disease by an industrial accident is compensible and that an internal failure brought about by exertion in the course of employment may be an accident within the meaning of the act." (Citing Jones v. California Packing Corporation, 121 Utah 612, 244 P.2d 640; and Purity Biscut Company v. Industrial Commission, 115 Utah 1, 201 P.2d 961).

Intermountain argues that the Powers case is inapposite because it does not discuss the issue of apportionment but instead turns solely on the question of whether an aggravated injury is compensible. At page 4 of its brief, petitioner insists that Mrs. Ortega makes no argument that this is an aggravation of a pre-existing problem. Petition then argues that even if applicable, the holding in Powers is that the aggravation alone is compensible, not the pre-existing difficulty.

Petitioner's argument attempting to distinguish the Powers case is clearly inaccurate. First the medical board's findings are that of Mrs. Ortega's thirty per cent psychological disability, ten per cent is attributable to pre-existing factors. Petitioner so states at pages 4, 5 and 6 of its brief. Moreover, Intermountain's primary argument in this appeal is that it should have to pay only for a portion of claimant's psychological disability because part of it existed prior to employment. If the condition existed to a certain extent prior to the accident, then it is necessarily true that the subsequent injury aggravated it.

Second, nowhere in the Powers opinion does this court say that in cases where pre-existing conditions are aggravated there must be apportionment of damages since the employer is liable only to the degree to which the preceding condition was aggravated. In fact, the opinion states only that the Industrial Commission's Order denying Powers claim is reversed and on remand the Industrial Commission found Powers one hundred per cent disabled and assessed all liability against the employer without any apportionment. (See Order of July 13, 1967).

Contrary to petitioner's claim, the Powers case is largely determinative of the issues presented in this appeal. Like Powers, Mrs. Ortega came to work with a condition that rendered her abnormally sensitive to the type of injury she sustained, but which did not effect her job performance prior

to the injury itself. Actually, Mrs. Ortega's case is even stronger on the facts than Powers since his pre-existing heart condition was so severe that it was triggered by the normal stresses of the job and not by a separate accident. In addition, the Industrial Commission follows the Powers case in measuring the amount of compensible aggravation by comparing Mrs. Ortega's present condition against the degree of her disablement prior to the injury of November 11th. In this regard, disability can be measured by two different standards of which the medical panel's findings is one and the other is the more practical and concrete consideration of how much one's capacity to work is limited before and after the injury. This clearly is the standard applied by this court in Powers in measuring the degree of aggravation. In adopting this second standard for measuring compensation, this court and the Industrial Commission have interpreted 35-1-69 to apply only when the disability operates as a measurable handicap upon one's ability to work at the time the individual commences employment. Therefore, unless Intermountain can show that Mrs. Ortega's work performance was ten per cent deficient prior to the accident, they cannot claim the Industrial Commission abused its discretion in ordering Intermountain to pay all costs of Mrs. Ortega's psychological treatment.

The case of McPhie v. Industrial Commission, 551 P.2d 504 (Utah 1976), cited by petitioner, provides additional authority

for application of the work comparison standard by disallowing the use of a percentage based finding - such as that produced by the Industrial Commission's medical panel - in a case where the Industrial Commission's award was apportioned between the employer and the State's Special Injury Fund under provisions of 35-1-69.

Furthermore, the Industrial Commission has apportioned the expenses relating to treatment of Mrs. Ortega's functional overlay disability, only it has done so according to the work disability comparison standard and in a manner consistent with this court's command in McPhie. It did so by specifically excluding from Intermountain's liability any counseling related to family or marital problems. Such domestic difficulties were identified by the treating psychiatrist as the other significant aspect of claimant's psychological problems. Thus, the Commission has not placed on Intermountain any liability which does not relate in some manner to the injury resulting from Mrs. Ortega's employment.

Finally, it is important to note that the Industrial Commission's findings in respect to Mrs. Ortega's disabilities are not final. As was mentioned previously, due to the strong potential for improvement in her psychiatric profile as treatment proceeds, the present finding of thirty per cent functional disability will likely be revised downward in the future. It is entirely plausible that the ultimate finding would be that claimant is ten per cent disabled, which disability relates

only to domestic factors, and which presents no immediate impairment of Mrs. Ortega's ability to work, and so release petitioner from further liability. Intermountain is thus jumping the gun in claiming that it has been saddled with an unfair final order since that order is subject to continuous review and modification. Regardless of what the final order of the Industrial Commission finds, Intermountain at present is being ordered to pay only for treatment of Mrs. Ortega's perception of pain, liability for which it is clearly in no position to deny.

Intermountain cites Hafers, Inc. v. Industrial Commission, 526 P.2d 1118 (Utah 1974); and Halvorson, Inc. v. Williams, 19 Utah 2d 113, 426 P.2d 1019 (1967) for the proposition that this court denies apportionment only when it finds no pre-existing conditions. However, these cases turn solely on the question of whether the Industrial Commission acted arbitrarily in finding that there was no pre-existing disability based on the evidence presented in each case. Since the Commission's orders, not its findings of fact, are at issue in the instant case, these cases are inmaterial. More importantly, contrary to petitioner's claim this court and the Industrial Commission have previously refused apportionment in the presence of a finding of pre-existing disability. See Duane Brown Chevrolet Company v. Industrial Commission, 29 Utah 2d 478, 511 P.2d 743 (1973), and Mountain States Steel Company v. Industrial Commission, 535 P.2d 1249 (Utah 1975). In each of these cases awards of total liability against an employer for injuries which only aggravated prior conditions were

upheld by this court over an appeal for apportionment by the respective employers. In light of these cases the Industrial Commission's award in Mrs. Ortega's case is clearly neither arbitrary nor contrary to law.

POINT II

CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY PAYMENTS DURING THE PERIOD OF MEDICAL TREATMENT.

The Industrial Commission's order directed petitioner to continue paying temporary total disability compensation to Mrs. Ortega "... until claimant is released for work activities ..." (Finding of Fact No. 5, Industrial Commission Order of April 2, 1976). Mrs. Ortega has not yet been released for work activities by her treating psychiatrist.

Petitioner asserts that since Mrs. Ortega has been transferred from in-patient to out-patient status, and a finding has been made in respect to permanent partial disability, that she can no longer be considered totally disabled. Both aspects of the preceding argument are clearly in error. First, a transfer from in-patient to out-patient status in no way implies that the patient is no longer totally disabled. Many conditions which would undeniably be considered totally disabling can be treated on an out-patient basis. Intermountain should be well aware of this since it is itself a health care organization. Continuous hospitalization would be absolutely necessary only if Mrs. Ortega were completely psychotic or otherwise

incapable of assuming any responsibility for her behavior. That is not the case here; Mrs. Ortega's symptoms are chronic severe pain. Mrs. Ortega was transferred from in-patient to out-patient status because she found the environment of the psychiatric ward at the University Medical Center so intolerable that it aggravated her condition.

Intermountain's claim that a finding of permanent partial disability implies a condition sufficiently stabilized that it can no longer be termed totally disabled is equally illogical. It need only be pointed out again that the finding of the medical panel as to permanent partial disability is a tentative conclusion, expressly set for reconsideration as psychiatric treatment progresses. Claimant's condition can therefore hardly be termed stabilized.

The central issue here is whether Mrs. Ortega is capable of returning to work at this time. Her treating psychiatrist indicates she is not. Petitioner has presented no evidence to challenge the doctor's conclusion. Therefore, the Industrial Commission's finding that Mrs. Ortega continues to be totally disabled and ordering payments accordingly is neither arbitary nor capricious.

POINT III

IT IS NOT CONTRARY TO THE LAW FOR THE INDUSTRIAL COMMISSION TO ORDER TREATMENT WITHOUT SPECIFYING A LIMIT ON COSTS FROM THE OUTSET.

As a practical matter, the Industrial Commission is unable in many cases to fix the costs of rehabilitation and treatment for the injuries involved. Accordingly, in modern practice the Industrial Commission specifies the type of treatment required but not necessarily the costs unless they can be accurately determined at that time. To require otherwise would be a pointless effort. The expenses incurred are determined by those individuals and organizations which provide the treatment. Having the Industrial Commission declare a sum beforehand would have no effect on these costs. Secondly, if a sum were set initially, the Commission would just continue to adjust it to reflect the real costs as treatment proceeded. Specific authority to make such continuing adjustments is conferred on the Commission by U.C.A. 35-1-78 (as amended 1953).

Petitioner cites Carbon Fuel Company v. Industrial Commission, 81 Utah 156, 17 P.2d 215 (1932) as authority for the requirement upon the Commission to state a final cost of treatment in its original order. That case interpreted a statute which is the present day 35-1-81. However, as written in 1932 this act stated a limit on benefits and investigatory requirements in relation any final awards in excess of $500.00 which have since been repealed. The holding in this case was basically tied in with the court's interpretation of the demand the legislature intended to impose on the Industrial Commission by these provisions since repealed. The case, therefore, has little continuing validity.

Of course, even under the new law the Industrial Commission cannot cease supervising the expenses incurred in treatment of Mrs. Ortega's condition. A similar situation resulting in this court finding a requirement of continuing supervision was presented in Utah Construction Company v. Matheson, 534 P.2d 1238 (1975). However, an order specifying just such supervision was entered by the Industrial Commission in its supplemental order of June 21, 1976.

The Industrial Commission's award in Mrs. Ortega's case is in full compliance with U.C.A. 35-1-81, the law in force today, and the requirements of continuing supervision over longterm medical treatment stated in the Utah Construction case, supra, and, therefore, should be sustained by this court.

CONCLUSION

In reviewing any order of the Industrial Commission of Utah, this court must find that the Commission's action was sufficiently arbitrary and capricious to amount to an abuse of its discretion before it may overturn that order. In this case, the petitioner, Intermountain Health Care, has presented no evidence of any such abuse of discretion. It has failed to show that the Industrial Commission's interpretation of U.C.A. 35-1-69 is incompatible with that act or inconsistent with this court's interpretation of that act. In addition, there is substantial evidence in the record that the Industrial Commission's order was specifically patterned after cases decided by this court interpreting Section 35-1-69 of the Utah Code. Petitioner Intermountain has likewise

failed to produce any plausible evidence that the Commission abused its discretionary duties in awarding Mrs. Ortega temporary total disability benefits during the period her treating physician has not released her for work. Finally, petitioner Intermountain has failed to produce any evidence or case authority that the Commission is not empowered to provide for long term medical treatment of a condition without specifying the ultimate cost of that treatment. In fact, there is substantial evidence and case authority for the opposite claim, namely, that so long as the Industrial Commission supervises the long term medical treatment of a party eligible for workmen's compensation benefits it may enter its order without specifying ultimate costs. To require otherwise would merely impose an impractical burden on the Industrial Commission which would ultimately have no effect whatsoever on the final costs of treatment.

Respectfully submitted,

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